United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1220

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

-against- :

VINCENT ALOI, :

Defendant-Appellant. :

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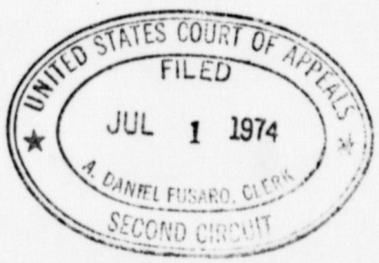
REPLY BRIEF FOR APPELLANT VINCENT ALOI

On Appeal From The United States District Court
For The Southern District Of New York



KRISTIN BOOTH GLEN
Attorney for Defendant-Appellant
Vincent Aloi
Office & Post Office Address:
30 East 42nd Street
New York, New York 10017
[212] 687-2033

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REPLY BRIEF FOR APPELLANT VINCENT ALOI

STATEMENT

The Government's brief (hereinafter cited as "Govt Br.") was served June 20, 1974 and oral argument was heard June 24, 1974. At that time counsel for Appellants Aloi and Dioguardi requested a week to file and serve reply briefs and that motion was granted. A motion to strike certain portions of the Government's brief was made, argued, and decision was reserved.

The instant reply brief deals primarily with the Government's discussion of Aloi's sufficiency points,[1] with some relatively brief observations on its answer to other issues.[2] The brevity of response as to these other issues should in no way be construed as abandonment or concession; it is rather because so little of a contradictory nature has been offered by the Government.

Finally, this reply brief will cover the Government's response to the electronic surveillance point originally made in Appellant Dioguardi's brief (hereinafter "Dio Br."), but common to all Appellants and previously expressly adopted by Aloi (Aloi Br. p. 6).

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[1]Points I, II and III of our main brief, hereinafter cited as "Aloi Br."

[2]For this Court's convenience, the points will be taken in the order in which they are set forth in the Government's brief.

POINT I

THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN CONVICTION OF ANY COUNT AGAINST ALOI

As all counsel argued in their joint motion to strike certain portions of the Government's brief, the question of what inferences may be drawn from what facts is extremely important in this case. For this reason the facts must be viewed with particular care. The Government's repeated attempts to substitute inferences it has drawn from the facts must not be permitted to replace the hard evidentiary base which is necessary to sustain conviction on any of the three counts.

A careful reading of relevant portions of the record itself, together with an analysis of the Government's legal arguments, demonstrate that there is no such base in the instant case.

1. Conspiracy Count

Of the 3-1/4 pages[3] devoted to this issue, the Government devotes virtually all its attention and citation to "facts" tending to show

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[3]Govt Br. pp. 42-45.

Vincent Aloi's[4] knowledge of the conspiracy.

As a matter of law (see infra, pp. 4-10) we do not believe that such evidence, even if extant, supports a conviction for conspiracy to violate specifically enumerated federal securities statutes. Many of the "facts," however, are simply not true.

For example, the Government claims that

> Aloi [presumably Vincent] ordered Lombardo to get back the $22,500 up-front money previously forwarded to Hellerman.

In fact, it is clear that the money was returned because Dioguardi had guaranteed to Buster Aloi that if the deal were not done within three weeks, the front money would be returned (Tr. 1790-91).

"Vincent Aloi's privileged position of power" is an assumption or conclusion by the Government, not a "fact" adduced at trial. The

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[4]Here, as throughout the case, the common surname Aloi is permitted to obscure the very real differences between the Appellant Vincent Aloi and his father "Buster" Aloi, who was severed for reasons of health. When the Government is concentrating on Vincent in its recitation of "relevant facts," his participation looms infinitely larger than it did at trial or in a complete reading of the transcript. The Government's own inconsistency in this respect is apparent in many instances throughout their brief. Where Vincent is sometimes characterized as the kingpin (Govt Br. 44) or "top man in the hierarchical group with which Lombardo and Savino were associates" (Govt Br. 41), Buster and Dioguardi are elsewhere described as the "two family leaders" (Govt Br. 68) or the "two leaders" (Govt Br. 69). In their statement of facts, Lombardo is characterized as "associated with" Buster (Govt Br. 10), needing Buster's blessing for the deal (Govt Br. 12), and the group is similarly described as "Buster Aloi's group" (Govt Br. 12).

instance given to show it, i.e., Aloi's arbitration of the "sit-down[5] with Dioguardi when Hellerman's $10,000 obligation to Savino and Fusco was established as a result of Trimatrix" (Govt Br. 43), involved an entirely and concededly legitimate deal (Tr. 1742). The only inferences to be drawn from this past relationship between Hellerman and Aloi (Govt Br. 13) was that the latter's past experience had been entirely legal but financially unsuccessful.

Perhaps the most serious misstatement of fact is that

> The inference of Aloi's knowledge is compelled by the fact that he learned of the AYSL deal from his father, Buster Aloi[6]
> [Govt Br. 43; emphasis added]

There is no such "fact." The Government's own citations--which reflect the totality of testimony about this incident--show only that a conversa-

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[5]None of the witnesses describing any of these meetings ever referred to them as anything other than that or as "conversations." The Government's persistent and fanciful use of the term "sit-down" (which interestingly is presented in quotations throughout the statement of facts, but which has apparently advanced to total authenticity by this portion of its argument where it is freed of its quotation marks), merely demonstrates its attempts to improperly inject inferences of sinister mob-like behavior at every turn.

[6]Their statement continues, in an equally unsupported fashion: "Buster knew that the AYSL offering was designed to defraud the public and the jury would be clearly justified in infering that when Buster called his son Vincent and told him of the problems that Graifer was encountering in the deal, he told his son Vincent what the deal was all about" (Id., emphasis added). This is, of course, no evidence at all as to anything Buster told Vincent, much less that he set forth the "problems Graifer was encountering."

tion took place but prove nothing about its content.[7] In fact, Graifer testified he didn't know how Vincent was to "take care of" the problem or to whom, if anyone, he would speak (Tr. 1248). This Court may not properly sustain a conviction on an inference drawn from the Government's inference, itself drawn from an entirely inconclusive fact (i.e., a conversation).[8]

A similar instance is the inference which the jury--and this Court--are supposed to draw from the "fact"

> . . . that [Aloi] sent[9] Lombardo to attend the fraudulent closing on July 28, 1970. [Govt. Br. 43][10]

Again, there is no such fact. Lombardo is reported as saying that he was going to tell Vincent Aloi what happened (Tr. 1860, Govt Br. 20, 43). From this it is possible to infer that Aloi "sent" him; it is equally possible to infer that he went on his own--or was sent by Buster Aloi. Again, an improper three-stage inferential chain is offered to "prove"

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[7]For further discussion of this, see Aloi Br. at pp. 38-39, especially fn. 79.

[8]Similarly, the conviction on count X may not be sustained. See infra, p. 11-12.

[9]The apparent importance of this non-fact to the Government's case is highlighted by their frequent repetition of it.

[10]Earlier the Government employed a somewhat different but equally inferential characterization in stating: "Ralph Lombardo . . . was there as a representative of the Aloi group" (Govt Br. at 19).

what an appellate court may only find established by two stages.[11]

The unsubstantiated "facts"[12] set forth on page 44 are equally inconclusive. For example, the "Tamcrest meeting" between Aloi and Graifer indicates that until Graifer's SEC appearance, no member of the "Aloi group"[13] had any knowledge of Hellerman's after-market manipulation (Tr. 599-604), which certainly negates any inference of "continued contact" with Dioguardi. Aloi's statement that he would talk to Dioguardi--which never occurred due to Dioguardi's imprisonment on an unrelated charge--supports none of the inferences the Government would have us draw.

All of this is, however, somewhat beside the point. The most the Government has shown--if indeed it has shown that much--is that Vincent Aloi had some general knowledge that Hellerman was engaged in a stock deal, and that that deal was very likely fraudulent. This "knowledge evidence" is far from enough to sustain conviction for membership

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[11] i.e., an (1) inference from a (2) fact, not an (1) inference from an (2) infering from a (3) fact.

[12] These are similar to paragraphs in the Government's Statement of Facts and particularly to their "Summary of Facts" which Appellants moved to strike for precisely these reasons. The repeated references to organized crime "hierarchies" and "well-defined structure" may not be considered probative by this Court not only because there are no verifying citations but because, as the Government itself admits, evidence as to those structures and their internal relationships never came in at trial, either because specifically excluded by Judge Knapp or by the Government's choice (Govt Br. 95-96, especially fn. 2, 95-96). The Government should not be permitted to retry its case here, based on evidence not admitted below.

[13] We admit no such group. We use the term here as shorthand for the people the Government claims as members, i.e., Buster Aloi, Graifer, Lombardo, Savino, Fusco and Vincent Aloi.

in a conspiracy to violate particular securities laws of the United States.

Assuming arguendo everything the Government claims to have proved--i.e., that Aloi knew of the conspiracy, and that he did an act which was necessary for the conspiracy's continuance or success,[14] legal membership in the conspiracy has not been established.

It is not enough that one have knowledge of probable criminal activity, e.g., United States v. Dennis, 302 F.2d 1, 12 (10th Cir., 1962)[15] or that one, knowing of the existence of a conspiracy, furnish its members with a necessary instrumentality, e.g., United States v. Gallishaw, 428 F.2d 769 (2d Cir., 1970). These two conditions may conceivably sustain a finding of aiding and abetting, see United States v. Greer, 467 F.2d 1064 (7th Cir., 1972)[16] but they do not constitute conspiracy.

For the latter:

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[14] i.e., that after he "stopped" the deal, he "permitted" it to go forward again, on the condition that "his boys"--Savino, Fusco and Lombardo--be repaid.

[15] "And even although [the] evidence was sufficient to support the inference that Durkin had knowledge of the conspiracy, it did not tend to prove that he had in any way become a part thereof. . . . Mere knowledge, approval or acquiescence in the object or purpose of a conspiracy does not make one a conspirator. Cleaver v. United States (10 C.A.), 238 F.2d 766. Accordingly, we hold the evidence to be wholly insufficient to support the conviction of Durkin" (Id. at p. 12).

[16] A long line of cases beginning with Nye and Nissen v. United States, 336 U.S. 618 (1949) makes a conviction of aiding and abetting improper, whatever the facts, unless the jury was fully instructed as to that crime. There was, of course, no such instruction here.

> [T]he scope of his [each defendant's] agreement must be determined individually from what was proved as to him. If, in Judge Learned Hand's well-known phrase, in order for a man to be held for joining others in a conspiracy, he "must in some sense promote their venture himself, make it his own," United States v. Falcone, 109 F.2d 579, 581 (2 Cir.), aff'd, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128 (1940), it becomes essential to determine just what he is promoting and making "his own." United States v. Borelli, 336 F.2d 376, 385 (2d Cir., 1964).
>
> [United States v. Varelli, 407 F.2d 735, 743 (7th Cir., 1969)]

This the Government, at trial and in its brief, has not done. Whether, like Ernest Gallishaw, Aloi knew or could have known that a crime was likely to be committed, and whether, like Mr. Gallishaw or Mr. Falcone,[17] he contributed something which aided the conspirators, he never promoted their goal or made it his own.[18]

However Aloi's intent--of regaining $10,000 from Hellerman for Savino and Fusco--was attained was of no concern to him. There is no

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[17] United States v. Falcone, 311 U.S. 205 (1940).

[18] There seems to be a looser standard in cases involving narcotics conspiracies, e.g., United States v. Guanti, 421 F.2d 792 (2d Cir., 1970), but the rationale for this is clear. When narcotics --or other contraband, e.g., United States v. Kellerman, 431 F.2d 319 (2d Cir.), cert. denied, 400 U.S. 957 (1970) (Govt Br. 46)--are involved, every participant must know that the ultimate result of his actions will be a sure violation of law. In an area like securities, marriages, Rocker v. United States, 288 F.2d 545 (9th Cir., 1961), or even sugar, Falcone, supra, the rule is as we have stated, substantially stricter and precludes conviction on these facts.

proof that he knowingly entered a conspiracy to violate the securities laws. Quite the contrary, the only hard evidence[19] demonstrates conclusively that he did not even know that the AYSL offering was illegal until sometime after it was over.

As this Court has observed before, a conspiracy is not proven by

> . . . the persuasive innuendo throughout [the] case that this was a gathering of bad people for an evil purpose.
> [United States v. Buffalino, 285 F.2d 408, 415 (2d Cir., 1960)]

The facts and inferences most favorable to the Government take us no further than Gallishaw. Accordingly, the conviction for conspiracy must be reversed for insufficient evidence.[20]

2. Multiple Conspiracies

We will not here repeat the arguments advanced in our main brief, since the facts set forth there clearly demonstrate that there was at least a good possibility of multiple conspiracies. Once this possibility exists, the trial judge must charge the jury accordingly, e.g., United States v. Borelli, 336 F.2d 376 (2d Cir.), cert. denied sub nom

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[19]Hellerman's testimony that Aloi wouldn't let Graifer repay him because they (Aloi and Graifer) had just discovered that the offering was illegal and that the money owed would be used toward repaying AYSL's investors.

[20]We, of course, specifically reserve all arguments made in our main brief as to this issue.

Mogavero v. United States, 379 U.S. 960 (1965). Here, where a proper request for such charge was made[21] the failure to charge constituted reversible error.

3. Wire Fraud

Here, again, as in (1) above, the Government must depend on the existence of information about the contents of the phone call alleged in Count Ten, but there is no such information. Accordingly, the cases cited in our brief, i.e., Osborne v. United States, 371 F.2d 913 (9th Cir., 1967) and United States v. Marino, 421 F.2d 640 (2d Cir., 1970) control.[22]

The Government's reply to our argument of an improper charge on this count is equally unconvincing. Although they cite several cases where courts have substituted the word "furtherance" for "execution,"[23]

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[21]See Appellant Dioguardi's Requests to Charge, handed up to this Court at oral argument. Like other motions, these were deemed to cover all defendants except those who specifically disclaimed them.

[22]Unlike our cases, the case cited by the Government (United States v. Zwerg, 467 F.2d 1217 [7th Cir.], cert. denied, 409 U.S. 1111 [1972]) involved the identity of a caller, not the content of the call. For that reason as well as the extraordinary amount of direct (not twice inferred) circumstantial evidence there adduced, the case is completely distinguishable.

[23]None of these are cases dealing with jury instructions and are accordingly, distinguishable. To the extent that those courts did use the terms interchangably we believe, however, that they were plainly wrong. See, e.g., Webster's New International Dictionary (2d ed.) Unabridged, which defines furtherance as the "act of furthering, or helping forward; promotion; advancement; progress," and execution as "act or process of executing; performance; achievement." In other words, the difference between inchoate and choate.

they prove the legal necessity for the latter in their Proposed Charge in this count[24] which specifically tracks the statutory language including "executing," not "furthering."

4. Count Eighteen

While in its other discussions of sufficiency the Government has ultimately (and incorrectly) relied on inferences drawn from inferences, when it reaches Count Eighteen it has nothing but falsehoods to support its position as to the crucial question of "use."[25]

> There was clear circumstantial evidence that the offering circulars were sent to purchasers of AYSL stock.
> [Govt Br. 51]

It then proceeds to describe that "evidence" as follows:

> [Hellerman] explained [to Lombardo and Dioguardi] . . . that he would then send an offering circular with the confirmation slips to the person buying the stock (Tr. 1842).
> [Govt Br. 51]

Hellerman said no such thing, as the transcript cited demonstrates.[26]

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[24]Handed up by Ms. Oberman at oral argument. This particular request was "adapted from the charge of Judge Canella in United States v. Deaton," affirmed by this Court.

[25]Again we do not repeat the other arguments made in our main brief at pp. 21-33 and here reserved.

[26]The conversation involved the necessity for back dating confirmation slips. Hellerman actually said: "I explained to them that when you send a confirmation you also send an offering circular" and went on to explain why the normal procedure would be disastrous in this case since the circular would alert the buyer that the offering had already expired.

In a footnote on the same page, the Government baldly states:

> For example, at the time Hellerman mailed the offering circulars to purchasers of the stock . . .
> [Govt Br. 51, fn. 1, emphasis added]

The reason for lack of citation for this extraordinary statement is obvious; there is absolutely no evidence that Hellerman ever mailed offering circulars to anyone!

Continuing its reliance on this totally unsupported premise, the Government then argues that because

> . . . Hellerman had already explained that as he sold the stock he mailed offering circulars and confirmations together to the individual buyers, it follows that the jury could have reasonably inferred that Hellerman sent (or gave) the offering circulars to his purchasers and to Harry Parsons who lined up a number of purchasers for Hellerman for distribution to his customers.
> [Govt Br. 52]

Not only is the underlying premise untrue, the resulting "inference" is directly contradicted by evidence actually introduced at trial. Four of Harry Parsons' customers testified;[27] each received nothing but a stock confirmation in the mail (Tr. 3546, 3559, 3569, 3570, 3577). The only possible inference based on this testimony is

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[27] There were five "victims" in all. Laudadio, De Pinho Sardo, Farinhias, and Bellini all testified that they had bought the stock on Parsons' recommendation (Tr. 3560, 3568, 3572, 3573, 3576). The fifth, Ms. Mulligan, bought the stock on the recommendation of one Renee De Marco, a stockbroker (Tr. 3586, 3589). She too received only a stock confirmation slip (Tr. 3585, 3587).

that no offering circulars were mailed to any purchasers.

The Government's last attempt at an "inference" of use of the circulars is based on "TDA's practice"[28] (Govt Br. 52). This is totally misleading.

Fisher (who ran the "back room" or administrative end of TDA) testified at length as to TDA's "standard practice," "regular course of business," "normal custom and general practice" (Tr. 3201, et seq.). In not one sentence did he mention the offering circular. Instead, he repeated again and again[29] that when Hellerman furnished TDA with a list of purchasers, a confirmation was made up for each purchaser and the fact of purchase was simultaneously recorded on the blotter (Tr. 3204-05).

> The confirmation was then placed in an envelope and mailed.
> [Tr. 3205]

Though he had no specific recollection, "the way [they] always did things" was to make up confirmations and send them out (Tr. 3207). The period covered by Fisher's recollection, as demonstrated by TDA's blotter, Govt. Ex. 40, was the end of May to the end of August--in other

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[28]The brief reads: Fisher testified that there were three purchasers who actually sent in checks in May--and it is inferable in view of TDA's practice that they were sent an offering circular (Tr. 3187-89)" (Id.). The testimony cited refers only to the fact that in May three checks were received. There is no reference to mailing anything.

[29]As to each individual confirmation charged in the indictment (Tr. 3219, et seq.).

words, the entire period of the AYSL "offering" (Tr. 3208). Yet never once, in Fisher's numerous statements about mailing out confirmations to names on the blotter (e.g., Tr. 3208, 3209, 3214, 3215) did he mention anything about offering circulars.

The jury could not have inferred from TDA's "normal practice" that offering circulars were sent out. The only permissible inference from this testimony[30] is precisely the opposite. Accordingly, there is no evidence whatsoever to support any finding of "use" in the common sense of the term.[31]

The Government's other attempts to show non-purchase-connected "use" are irrelevant[32] for they occurred prior to Aloi's alleged entry into the conspiracy, and accordingly cannot sustain a conviction based solely on Pinkerton liability, e.g., United States v. Cantone, 426 F.2d 902 (2d Cir., 1970).

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[30]As well as from the testimony described in our main brief as to the original delivery of the circulars to Hellerman's couch from whence they never moved (Aloi Br. 28, and fn. 54).

[31]No cases have been found defining the term in its statutory context. However, since the Securities Law of 1933 is primarily a reporting statute aimed at giving adequate information to purchasers of securities, it is fair to assume that "use" is directed at those purchasers.

[32]We also do not believe that they can possibly constitute "use" within the purview of the statute.

As there is no evidence to support the crucial statutory requirement alleged in Count 18[33] Aloi's conviction on that count must be set aside.

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[33]As apparently recognized by the judge in his charge (see Aloi Br. 31-33).

POINT II

THE GOVERNMENT HAS NOT SATISFACTORILY COMPLIED WITH THE TRIAL COURT'S DIRECTIONS ON APPELLANTS' REQUESTS CONCERNING ELECTRONIC SURVEILLANCE

For more than a year, before,[34] during,[35] and after[36] their trial, Appellants have requested disclosure of any electronic surveillance of their conversations or premises. As set forth in Appellant Dioguardi's main brief (Dio Br., pp. 60 et seq.), the trial judge, on numerous occasions, ordered the Government to conduct an inter-agency search for federal taps, and to place the Government's knowledge as to state surveillance "on the record" for this Court's possible review.[37]

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[34]Letter requests, pursuant to the procedure suggested by Judge Knapp, were made for all defendants.

[35]Repeated instances of this are set forth in Appellant Dioguardi's Brief, at pp. 61-69.

[36]Brief of Appellant Dioguardi, Point V, pp. 60-70, expressly incorporated by reference. Rule 28(i) F.R.A.P., by all Appellants.

[37]An interesting and apparently novel variation of Brady would occur if the Government knew of the existence of state taps, which Defendant believed might contain exculpatory material, but which taps the Government had not itself used. It is unclear what the defendants' remedy would have been in such a case, but of course the question was never squarely put, since the Government never stated exactly what its knowledge was.

On the eve of oral argument Appellants' counsel obtained a copy of a letter sent by Assistant Attorney General Petersen's office to the United States Attorney's Office,[38] which the Government apparently presents in full satisfaction of its obligations. This letter is, however, entirely inadequate, as were the Government's representations at oral argument.

First, it must be noted that the letter is no more than that; it is not an affidavit as requested by the United States Attorney's Office,

> In light of the procedures established subsequent to the Court of Appeals decision in United States v. Jeffrey Smilow.
> [Govt Br. 118, fn. 1]

In light of recent and unfortunate occurrences, most Circuits have required that affirmance or denials of electronic surveillance be done in affidavit form, e.g., United States v. Alter, 482 F.2d 1016 (9th Cir., 1973), and in fact such is apparently the practice of this United States Attorney's Office. The Court should take this opportunity to make such requirement mandatory.

Even aside from the unsworn nature of the information, the letter is entirely inadequate. The first paragraph, which refers only to FBI surveillance, covers only the individual defendants named and

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[38] Interestingly, the Government's brief does not contain a copy of the letter itself, but only a subsequent letter purporting to summarize it (Govt. Br., 119, fn. 1). After counsel strongly pressed the United States Attorney's Office, we were given the letter itself (with certain portions excised) and handed copies up to this Court at oral argument. For the Court's convenience we are reproducing the letter at the end of this brief as Appendix A.

> premises known to be owned, leased or licensed by them.

This improper and narrow inquiry deprives the Appellants of crucial facts[39] and this Court of any proper basis of review. For it is clear under Katz v. United States, 389 U.S. 347 (1967) that individuals may not be electronically surveilled in any place where they have a reasonable expectation of privacy. The number of such places is far greater than simply "premises owned, leased or licensed"[40] and the failure to conduct the broader and constitutionally compelled inquiry under Katz is fatal error.

The third paragraph, which purports to involve an inter-agency search is even less satisfactory. First, the agencies listed[41] omit the two which would be most likely to have engaged in electronic surveillance

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[39] i.e., a lot of phone numbers and locations checked, see fn. 40, below.

[40] For example, Vincent Aloi worked at two companies, City Carriers and Cameo Weddings, whose offices would not be covered by this disclaimer, yet where he would be entitled to freedom from surveillance under Katz. Likewise, Lombardo testified to a long term relationship with a woman not his wife, by whom he had a child and with which he frequently stayed. Under Katz conversations overheard on her phone or in her house would be similarly impermissible. These are but two of a whole host of examples which make a mockery of the supposedly "complete search of FBI files." Without the actual information of what premises and/or phone numbers were checked, however, Appellants cannot effectively challenge possible illegal surveillance.

[41] Unlike affidavits reviewed by counsel in other cases, there is no indication as to why particular agencies were chosen and listed; this, in the light of the omissions, is quite significant.

in this case--the S.E.C. (which conducted the original investigation) and the Joint Strike Force on Organized Crime.[42] Equally significant, the overly limited inquiry of the first paragraph has now been even further narrowed to whether the "above named individuals" were "subjected to electronic surveillance." "Premises owned, leased or licensed" have now been omitted, and the signif_cantly narrower term "subjected" has been substituted for the proper "overheard."

The so-called inter-agency disclaimer is, accordingly, so incomplete and lacking in specificity as to be meaningless--and wholly inadequate under present law.

Neither the Petersen letter, the Government's brief nor its oral representations provide any answer to Appellants' and the trial judge's requests[43] for information on state taps.[44] Despite an ad-

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[42]Appellants, particularly Aloi and Dioguardi, have every reason to believe that they have been subjected to surveillance by the Strike Force. See, e.g., Dio. Br. 62, fn. 1. In fact, one Assistant United States Attorney admitted knowledge that Dioguardi had been overheard by the Strike Force on another case (Tr. 5355).

[43]Judge Knapp repeatedly ordered the Government to make inquiry as to any knowledge it (not only Mr. Schreiber) might have as to state wiretaps and whether information as to such taps had been used, e.g., Tr. 1953-54, 3536-40, 4539.

[44]The likelihood of state taps has been dramatically reinforced by recent revelations. See N.Y.L.J., June 26, 1974, p. 1, New York Led in 1973 Wiretap/Bug Orders. That article discloses the following relevant information: the major crime for which wiretap orders were sought was gambling and the leading county was Kings (Aloi is purportedly a high member of the "Columbo Family" whose "business" is gambling in Brooklyn). In 1973, 334 wiretaps [continued on next page]

mission of at least some tapping by the Strike Force (Tr. 5355)[45] and Mr. Goldberg's representations as to his belief of state taps, e.g., Tr. 1953, 2073, 3537, 4537, this crucial issue[46] remains completely unresolved.

This Court should not be placed in the position of trier of fact because of the Government's dilatory tactics and/or carelessness when, as here, the "facts" themselves are both inadequate and conclusory, a remand is the only appropriate remedy.

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were authorized by New York State judges, while only 17 taps were authorized by federal judges in the Southern and Eastern Districts. If the Government's theory about Aloi is correct, it is inconceivable that he was not subject to state tapping.

[45]Appellants are not, of course, privy to the internal procedures of this organization, but have strong reason to believe that such surveillance as occurs, although jointly authorized, is physically carried out by the State--thus technically protecting representations of non-federal surveillance. This, of course, places federal defendants in an almost impossible situation and underscores the need for complete disclosure of Government knowledge so that any remedies consistent with due process may be pursued.

[46]Under either Elkins v. United States, 364 U.S. 206 (1960) prohibiting federal use of illegally obtained State information, or Brady v. Maryland, 373 U.S. 83 (1963). See fn. 37, above.

POINT III

OTHER ISSUES RAISED IN THE GOVERNMENT'S BRIEF DO NOT OBVIATE THE NECESSITY FOR REVERSAL

While we continue to rely on the points raised and argued in our main brief we have a few brief observations about the Government's brief. These will be discussed in the order in which they occur in the Government's brief.

1. Fair Trial-Prejudice Point
(Aloi Br., Point IV, pp. 41-52;
Govt Br., pp. 69-76)

In our argument about jury selection, we pointed out that an irreconcilable conflict arose between counsel for Mr. Dioguardi and counsel for the other four[47] defendants which required apportionment of their peremptory challenges.

The Government cites no cases which contradict our basic argument;[48] they do however indicate that Judge Knapp offered the four defendants what they requested and that counsel conclusively rejected that "proper" offer (Govt Br. 73). This is not the case.

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[47]Mr. Fusco was later severed.

[48]Stilsen and Crutcher, cited at p. 73 of their brief are discussed and distinguished in our main brief at p. 45 and fn. 92, Id.

When the conflict between Dioguardi's theory of jury selection[49] and that of the others became apparent, six peremptory challenges remained. Mr. Newman suggested that the number be rounded out to 10, with each defense counsel given two and the Government given an additional two (to maintain the proper ratio) (JT 320-21).

When Judge Knapp rejected this suggestion, the Government suggested that each defense counsel be given one of the remaining challenges with one to be exercised unanimously. (JT 323). This plan, which was apparently acceptable to everyone but Mr. Goldberg, was rejected by the judge who had offered three challenges to Mr. Goldberg and three to the other four defense counsel (JT 321). The latter, of course, objected to this plan as completely unfair and violative of their clients' rights and Judge Knapp ordered a five minute recess to permit them to reconsider.

We do not know what their response might have been since, at the end of the recess Judge Knapp withdrew his "offer" and ordered that the remaining challenges be exercised unanimously--which, as we have argued, constituted reversible error.

The rest of the Government's argument on our prejudice point is similarly unresponsive. It attempts to rebut each particular instance

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[49]Any innuendo as to the lack of bona fides of this distinction is conclusively rebutted by the record (see, e.g., JT 318-20, especially JT 325).

of error with cases which say that such error is nd enough to require reversal. This completely--and significantly--ignores our contention that it was the totality of prejudice which deprived Aloi of a fair trial, not any individual instance standing alone.[50]

Further, the Government's statements and citations[51] in no way meet our argument that the bottom line requirement of an adequate and individualized charge [see, e.g., United States v. Weiss, ___ F.2d ___ (2d Cir., January 15, 1974), slip. op. 1463] was not met. The prejudice which obviously accrued was never cured and the deprivation of a fair trial requires reversal of Aloi's conviction.

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[50]The Government's statement that "when information of a potentially prejudicial nature was elicited during testimony, the trial judge carefully gave cautionary instructions" (Govt Br. 75) is significantly supported by but a single page reference and that very late in the trial. It is our impression (see Aloi Br., p. 53, fn. 110) that this was not the case.

[51]For example, in United States v. De La Rosa, 450 F.2d 1057 (3d Cir., 1971), cert. denied sub. nom. Jones v. United States, 405 U.S. 957 (1972) (Govt Br. 74), there was tangible and prejudicial evidence against only one of four co-defendants. While a severance was not granted, the clear potential for prejudice was deemed cured by a charge in which each piece of evidence was particularly noted and the judge instructed the jury that it might be considered only against that one defendant. Particularized individualization is required by common sense and by law. See Sims v. United States, 405 F.2d 1381, 1382 fn.2 (D.C.Cir., 1968).

2. Graifer's Understanding of the Oath
(Aloi Br., Point VII, p. 64;
Govt Br., Point V(E), p. 105)

The cases cited by the Government are completely irrelevant to the points we make. Although witnesses have clearly been permitted to testify by affirmation rather taking an oath, e.g., Gillars v. United States, 182 F.2d 962 (D.C.Cir., 1950),[52] the jury is clearly apprised of this difference by the Clerk's words that the witness

> . . . solemnly affirms under pain and penalty of perjury.

The fact that a witness may not be barred from testifying because he chooses to affirm, e.g., United States v. Looper, 419 F.2d 1405 (4th Cir., 1969)[53] in no way detracts from common understanding that the oath--as "taken" by Graifer--involves an awareness of divine retribution. As in Looper,[54] the jury should have been permitted to consider this difference in assessing Graifer's understanding and credibility.

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[52]There, a D.C. statute specifically provided that a witness must testify under oath unless his religious scruples prohibited it, as did the witness in Gillars.

[53]All cases discussed are cited in the Government's Brief at p. 107.

[54]A full voir dire was held there as it was in United States v. Hardin, 443 F.2d 735 (D.C.Cir., 1970). There the potential witness, an eleven year old child, testified as to his understanding of the oath, that he regularly attended Sunday School as well as secular elementary school (Id. at p. 737, fn. 3.

3. Sentencing
(Aloi Br., Point VIII, pp. 67-86;
Govt Br., Point IX, p. 121-24)

To the extent that United States v. Rosner, 485 F.2d 1213 (2d Cir., 1973) contradicts our requests for a hearing with due process safeguards, we must respectfully argue that the decision there was incorrect and should not bind us.[55]

We note, however, that United States v. Weston, 448 F.2d 626 (9th Cir., 1971), cert. denied, 404 U.S. 1061 (1972) upon which we rely with respect to the improper presentence report,[56] is cited with approval in Rosner, accordingly, the sentence should be set aside on that ground alone.

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[55]We do not know precisely what was argued there, but believe that no full scale attack on Williams, such as that made in our brief (Aloi Br. 83-86) was presented to the Court. For this reason alone, Rosner is not binding.

[56]Aloi Br., pp. 79-80.

CONCLUSION

For all the reasons set forth in our main brief and above, the instant convictions must be set aside.

Respectfully submitted,

KRISTIN BOOTH GLEN
Attorney for Defendant-Appellant
Vincent Aloi
30 East 42nd Street
New York, New York 10017

Appendix

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the
Division Indicated
and Refer to Initials and Number

TSL:ADP:sam
012

FEB 13 1974

Mr. Alan Kaufman
Assistant U.S. Attorney
New York, New York

Dear Mr. Kaufman:

This is with regard to your request that we ascertain whether the following individuals and company were monitored by electronic surveillance.

A review of the Department of Justice files discloses no information indicating that conversations of Vincent Aloi, Pasquale Fusco, Ralph Lombardo, and John Savino were at any time overheard by electronic surveillance or that premises known to be owned, leased, or licensed by them were covered by electronic surveillance by the Federal Bureau of Investigation. Also, our files disclose no information indicating that Jard Products was the subject of electronic surveillance or that premises known to be owned, leased, or licensed by it were covered by electronic surveillance by the Federal Bureau of Investigation.

John Dioguardi was present at a conversation monitored by the Federal Bureau of Investigation on October 2, 1964, No electronic surveillance was conducted by the Federal Bureau of Investigation on premises in which he was the owner, lessee, or licensee. The logs of this conversation are being forwarded to you under separate cover by the Federal Bureau of Investigation.

Also, the above-named individuals and company were never subjected to electronic surveillance by the Internal Revenue Service,

APPENDIX A

the United States Postal Service, the United States Secret Service, the Bureau of Alcohol, Tobacco, and Firearms, the Drug Enforcement Administration, the Bureau of Customs, the Central Intelligence Agency, the United States Department of Labor, the United States Department of Defense or the United States Department of State.

Sincerely,

HENRY E. PETERSEN
Assistant Attorney General
Criminal Division

By: Kurt W. Muellenberg

KURT W. MUELLENBERG, Deputy Chief
Organized Crime and
Racketeering Section
Criminal Division